Office - Supreme Court, U.S.
FILED
SEP 20 1957
JOHN T. PEY, Clerk

No. 397

In the Supreme Court of the United States

OCTOBER TERM, 1957

HAROLD ROBERT LOVE, PETITIONER

v.

ARTHUR W. NEWBURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
PAUL A. SWEENEY,
JOSEPH LANGBART,
Attorneys,
Department of Justice, Washington, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

Barr v. *Matteo and Madigan*, 244 F. 2d 767, petition for certiorari pending, No. 409, this Term	4, 8, 11
Booth v. *Fletcher*, 101 F. 2d 676, certiorari denied, 307 U. S. 628	4
Cooper v. *O'Connor*, 99 F. 2d 135, certiorari denied, 305 U. S. 643	10
Green v. *Reading Co.*, 183 F. 2d 716	9
Gregoire v. *Biddle*, 177 F. 2d 579, certiorari denied, 339 U. S. 949	10
Harlem Taxicab Ass'n v. *Nemesh*, 191 F. 2d 459	9
Irvin Jacobs & Company v. *Fidelity & Deposit Co. of Md.*, 202 F. 2d 794	9
Keen v. *Overseas Tankship Corp.*, 194 F. 2d 515, certiorari denied, 343 U. S. 966	9
Montgomery v. *Virginia Stage Lines*, 191 F. 2d 770	9
Moreau v. *Pennsylvania R. Co.*, 166 F. 2d 543	9
Schneider v. *O'Neal*, 145 F. Supp. 120	7
Sweeney v. *United Features Syndicate*, 129 F. 2d 904	9
United States v. *Kelinson*, 205 F. 2d 600	8–9
Washington Annapolis Hotel Co. v. *Riddle*, 171 F. 2d 732	10
Williams v. *Powers*, 135 F. 2d 153	9

439136—57

Constitution and Statutes:

	Page
Constitution of the United States, Seventh Amendment	6
5 U. S. C. 309	4
District of Columbia Code, Title 12, Section 201	2
Miscellaneous:	
Comment: *Defamation Immunity for Executive Officers*, 20 U. of Chi. L. Rev. 677 (1953)	11
Developments in the Law—Defamation, 69 Harv. L. Rev. 875 (1956)	8
Developments in the Law—Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827 (1957)	11
F. R. Civ. P:	
Rule 8 (e) (2)	10
Rule 12 (d)	7
Rule 12 (h)	7, 8
Rule 15 (b)	8
Rule 41 (b)	7
Rule 46	8
Rule 50	7
Rule 51	8
5 Moore's *Federal Practice* (2nd ed.):	
pp. 1035, *et seq*	7
pp. 2313, *et seq*	7

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 397

HAROLD ROBERT LOVE, PETITIONER

v.

ARTHUR W. NEWBURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

Judgment of the District Court, pursuant to the verdict of a jury, was entered without an opinion. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 20–21) is reported at 242 F. 2d 372.

JURISDICTION

The judgment of the Court of Appeals was entered on February 28, 1957. A petition for rehearing, filed out of time by leave of the Court of Appeals, was denied on April 17, 1957 (Pet. App. 23; R. 101, 142–143). By successive orders dated July 16, 1957, and

August 20, 1957, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to August 23, 1957 (Pet. App. 24–25). The petition for a writ of certiorari was filed on August 23, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, in an action for libel and slander brought against respondent, a government official, the court below erred in holding that the defense of absolute privilege had been adequately raised in the District Court.

STATEMENT

The petitioner, Harold Robert Love, on May 26, 1953, instituted a suit *pro se* alleging that respondent, Arthur W. Newbury, had defamed him beginning about May 1947. The complaint specified seven specific incidents (R. 1–5). Respondent filed a motion for summary judgment on the ground that the complaint failed to state a cause of action, since the alleged defamations were acts performed by him in his official capacity as Director of Civilian Personnel, United States Army Finance Corps, and Special Assistant for Civilian Personnel to the Chief, Army Audit Agency (R. 7). The motion was denied, whereupon respondent filed an answer raising the same defense. The answer further alleged that the District of Columbia one-year statute of limitations (Title 12, D. C. Code, Section 201) barred action for the incidents specifically enumerated in the complaint, that the statements complained of were true, and

that the statements were privileged, having been made in good faith and without malice in the carrying out of a duty imposed upon respondent (R. 7–9).

At the trial, petitioner adduced evidence only as to two of the libels, *i. e.*, (1) two letters of charges, dated July 11 and 18, 1947, concerning the personnel action taken with respect to petitioner's position as auditor with the Army Audit Agency (R. 19, 22–29, 33, 45, 47–49), and (2) respondent's affidavit of September 2, 1947, filed in connection with the personnel proceedings against petitioner (R. 19, 32–3, 48–50). Petitioner also testified about an alleged telephone conversation between an attorney, Harry J. Maginnis, and respondent in June 1952. The telephone conversation, which constituted slander and not libel, was not specifically mentioned in the complaint nor in any of the pre-trial proceedings,[1] although Mr. Maginnis was one of twenty-three persons mentioned in petitioner's answers filed in response to respondent's interrogatories (R. 10–11).

Petitioner's testimony concerning the telephone call was as follows: After reading an article in a Chicago newspaper about the successful efforts of an attorney, Harry Maginnis, petitioner came to Washington for the purpose of consulting with Mr. Maginnis in connection with his dispute with the Civil Service Commission, which dispute petitioner believed closely paralleled the cases previously handled by the attorney (R. 35, 43, 44, 68, 69). Mr. Maginnis, in petitioner's presence, telephoned Newbury at his government office

[1] At pre-trial, petitioner limited his case to libel (R. 12–13).

(R. 35, 36, 44). Petitioner stated that he sat across the desk from Mr. Maginnis when the call was made, that he could hear everything that was said on both ends (R. 36), and that "toward the end" of the conversation he listened in on an extension (R. 37–40). After the court restricted testimony to what was actually heard on the extension, petitioner said that respondent told Maginnis that "Love had been fired on charges and that the charges were that * * * Love * * * had taken papers out of the files at Jeffersonville, Indiana, Quartermaster Depot and given them to Senator Capehart without authority. * * * And that he had been found guilty of that by the Civil Service Commission, and other charges" (R. 40–41). Respondent, when called as a witness during the presentation of petitioner's case, testified as to his participation in the personnel proceedings against Mr. Love while administering the civilian personnel program of the Army Audit Agency as Chief, Civilian Personnel Branch of the Management Division of the War Department, Finance Corps (R. 45–48).

At the close of the petitioner's case, the Assistant United States Attorney representing the respondent[*] made a motion for "the Court to direct the jury to enter a verdict in defendant's favor" (R. 48). This motion asserted the defense of absolute immunity, *i. e.*, that

---

[*] Respondent has been represented by attorneys of the Department of Justice throughout this proceeding pursuant to 5 U. S. C. 309; see, *e. g.*, *Booth* v. *Fletcher*, 101 F. 2d 676 (C. A. D. C.), certiorari denied, 307 U. S. 628; and *Barr* v. *Matteo and Madigan*, No. 409, this Term, pending on petition for certiorari.

all the incidents of defamation were actions by the respondent in connection with the performance of official duties. In addition, it was urged (1) that action with respect to the three alleged libelous documents was barred by the District of Columbia one-year statute of limitations, and (2) that the telephone conversation was a qualifiedly privileged incident because Mr. Maginnis was acting in a representative capacity (R. 51–52). The motion was granted except as to the telephone conversation (R. 66).

The respondent presented his case, and denied that there was a telephone conversation between himself and Mr. Maginnis in June 1952 regarding Love (R. 66–67). The respondent also testified that his only personal contact with the petitioner took place in 1948 at the Civil Service Commission hearing (R. 67). Mr. Maginnis was not called as a witness, but it was stipulated that if he had been called he would have testified that Mr. Love had called on him, and that he associated the petitioner's and respondent's names together (R. 76).

The questions as to whether the telephone conversation took place, whether the statements attributed to respondent were made with malice, and the amount of damages, if any, were submitted to a jury. The jury granted petitioner a verdict and judgment of $100 as compensatory damages (R. 92).

On appeal, the Court of Appeals for the District of Columbia Circuit, in a *per curiam* opinion, held that, "in the circumstances of this case, appellant's [respondent's] statements were made in the proper perform-

ance of his official duties and are, therefore, absolutely privileged" (242 F. 2d at 373; R. 100; Pet. App. 21), observing in a footnote that "[t]his defense was adequately, if inartistically, asserted in the District Court" (*ibid.*).

ARGUMENT

Petitioner broadly declares that the Court of Appeals erroneously reversed the trial court's judgment on the evidence in derogation of the Seventh Amendment and accepted principles of appellate review.[3] Petitioner's only real quarrel, however, is with the Court of Appeals' conclusion that the privilege defense was "adequately, if inartistically, asserted in the District Court." The ruling, we submit, is clearly correct.

1. As respondent pointed out in the court below, when counsel for respondent at the close of plaintiff's (petitioner's) case "move[d] the Court to direct the jury to enter a verdict in defendant's favor" (R. 48), an attack was not being made on the sufficiency of the evidence.[4] Instead, it was a motion to dismiss based on Love's "failure to state a claim upon which relief can be granted * * *" (Rule 12 (h), F. R. Civ.

---

[3] To support his contention that the Court of Appeals committed basic error in this case, petitioner, disregarding the realities of the situation, particularly the rulings of the trial court on various questions which shaped the course of the trial, relies on a series of statements by counsel in the trial court, statements in his brief below, and respondent's denial that there was a telephone conversation.

[4] Therefore, it was not a motion under either Rules 50 or 41 (b), F. R. Civ. P.; see 5 Moore's *Federal Practice* (2d ed.), pp. 2313, *et seq.* and pp. 1035, *et seq.*

P.), which *"may also be made * * * at the trial on the merits * * *"* (*ibid.*; emphasis added). Cf. *Schneider* v. *O'Neal,* 145 F. Supp. 120 (E. D. Ark.); and see also Rule 12 (d), F. R. Civ. P., which provides that "hearing and determination [of a motion to dismiss can] be deferred until the trial." The motion can also be viewed as a renewal of the motion to dismiss (implicit in the earlier motion for summary judgment) with the issues of fact, if any, in a position to be resolved on the basis of the testimony which petitioner had adduced to support his cause of action. The trial judge granted the motion as to the allegedly libelous documents both on the grounds of absolute privilege and limitations,[5] but after extended argument, the trial judge denied the motion as to the telephone conversation (R. 48–66). As is clear from the record, respondent had no previous opportunity to attack the legal sufficiency of the telephone conversation as a cause of action,[6] and the motion at the close of petitioner's case was an appropriate and timely means of raising that defense.[7]

---

[5] The trial motion differed from the motion for summary judgment by including the telephone conversation (as to which qualified privilege was also raised), and also by raising the bar of the statute of limitations as to the libel incidents.

[6] The testimony about the telephone conversation was not adduced solely for the purpose of proving another defamatory incident, but its main purpose was stated by petitioner's counsel to be to circumvent the statute of limitation defense on a "theory of republication" (R. 59–61).

[7] Defense counsel had other alternatives under Rule 15 (b) F. R. Civ. P., which would have required an amendment of the pleadings and also necessitated a continuance. Instead, the simpler course of action permitted by Rule 12 (h), F. R. Civ. P., was taken.

2. Although petitioner adheres to the arguments made in, and rejected by, the Court of Appeals, he does not now flatly contend that respondent failed to comply with Rule 51, F. R. Civ. P., relating to instructions to the jury. Petitioner recognizes that these contentions either ignore the relevance of Rule 46, F. R. Civ. P.,[5] to the circumstances in question, or that they primarily concern respondent's arguments about the defense of qualified privilege, a question which the court below found unnecessary either to explore or decide.[6]

Moreover, time and again courts have indicated that one does not waive error committed by a trial court by continuing with the trial in accordance with the court's rulings without further effort to have the court reverse itself. There is nothing which "require[s] a lawyer to become a chattering magpie" on such occasions. *United States* v. *Kelinson*, 205 F. 2d 600, 601–602 (C. A. 2). Counsel "is not required to indulge in reiterative insistence in order to preserve his client's rights." *Irvin Jacobs & Co.* v. *Fidelity & Deposit Co. of Maryland*, 202 F. 2d 794, 801 (C. A. 7); *Moreau* v. *Pennsylvania R. Co.*, 166 F. 2d

---

[5] Rule 46, F. R. Civ. P., states in pertinent part: "Formal exceptions to rulings * * * of the court are unnecessary; * * * it is sufficient that a party, at the time of the ruling * * *, makes known to the court the action which he desires the court to take * * *; and * * * the absence of an objection does not thereafter prejudice him."

[6] The defense was raised here even though we do not consider it adequate as a protection to government officials. See Petition for Certiorari in *Barr* v. *Matteo and Madigan*, No. 409, this Term, pp. 7–8, 12; see also *Developments in the Law—Defamation*, 69 Harv. L. Rev. 875, 917–918 (1956).

543, 545 (C. A. 3). To the same effect are the rulings in *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 519 (C. A. 2), certiorari denied, 343 U. S. 966;[10] *Harlem Taxicab Ass'n* v. *Nemesh*, 191 F. 2d 459, 461 (C. A. D. C.); *Montgomery* v. *Virginia Stage Lines*, 191 F. 2d 770, 773 (C. A. D. C.); *Williams* v. *Powers*, 135 F. 2d 153, 156 (C. A. 6).[11] See also *Sweeney* v. *United Feature Syndicate*, 129 F. 2d 904, 905–6 (C. A. 2); and *Green* v. *Reading Co.*, 183 F. 2d 716, 719 (C. A. 3).

No matter what the verbal formulation, the cases cited enunciate a position that refutes the petitioner's basic contention that respondent, by presenting evidence in support of his denial that there was a telephone conversation, waived whatever error the trial judge may have committed with respect to the motion to dismiss made at the end of petitioner's case.

Modern practice permits one to defend on alternative grounds. When the trial court denied the respondent's motion based on privilege at the end of petitioner's case, respondent was not barred from presenting other defenses that were available to him. See, *e. g.*, *Washington Annapolis Hotel Co.* v. *Riddle*, 171 F. 2d 732, 736 (C. A. D. C.), where the court said that Rule 8 (e) (2), F. R. Civ. P., permitted

[10] "Nothing goes further to disturb the proper atmosphere of a trial than reiterated insistence upon a position which the judge has once considered and decided. The notion is wholly untenable that in order to protect himself against an imputed surrender, a party must reassert what has been overruled every time the occasion comes up again." (194 F. 2d at 519.)

[11] "• • • [W]here it appears in the record that the point urged on appeal was called to the attention of the trial court in such a manner as to clearly advise it as to the question of law involved, that is sufficient." (135 F. 2d at 156.)

denial of an utterance of slanderous words and also a defense of privilege. Thus, respondent could plead the defense of immunity, which presupposes that there was a telephone conversation, even though he also denied that the event occurred.

3. Inasmuch as the jury found that there had been a telephone conversation, respondent did not seek to have the Court of Appeals reverse that factual determination. But this did not bar the court below from deciding the question of law with respect to the privilege defense, if it had been raised in the trial court.[12] When respondent appealed from the verdict and judgment entered, he did so on the ground that he had either a qualified or absolute privilege, *i. e.*, the

---

[12] The telephonic inquiry by Mr. Maginnis was directed to respondent apparently in the hope that the latter, who, at the time, was the Director of Civilian Personnel, Finance Corps, United States Army, and Special Assistant for Civilian Personnel to the Chief, Army Audit Agency, would take some further administrative action toward reinstating petitioner who in 1947 had been discharged from his position as an auditor with the Army Audit Agency (R. 56–57). Respondent urged that he was immune because the action he allegedly took was in connection with official duty, in other words, his statements were made "'*in relation* to matters committed by law to his control or supervision' * * * or * * * '*more or less* [in] *connection with* the general matters committed by law to his control or supervision.' (Spalding v. Vilas, 161 U. S. 483, 498, * * *." *Cooper* v. *O'Connor*, 99 F. 2d 135, 139 (C. A. D. C.), certiorari denied, 305 U. S. 643; see also *Gregoire* v. *Biddle*, 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949; *Developments in the Law—Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 837 (1957); Comment: *Defamation Immunity for Executive Officers*, 20 U. of Chi. L. Rev. 677, 679 (1953.) In *Barr* v. *Matteo and Madigan*, 244 F. 2d 767, 768 (C. A. D. C.), petition for certiorari pending (No. 409, this Term), another panel of the court below accepted the decision in this case as correct.

statements made during the telephone conversation were in the course of or had connection with the performance of his official duty. This, in short, was not an attack on the facts as found by the jury, but rather acceptance of the factual determination. The Court of Appeals, we submit, correctly held that the defense was "adequately" (although possibly "inartistically") raised in the District Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
PAUL A. SWEENEY,
JOSEPH LANGBART,
Attorneys.

SEPTEMBER, 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957